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No. 84-139

In the Supreme Court of the United States

OCTOBER TERM, 1984

CLARENCE R. YEAGER DISTRIBUTING, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

WILFORD W. JOHANSEN
Acting General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

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QUESTION PRESENTED

Whether the Board properly found, in the circumstances of this case, that petitioner was barred from contesting the union's majority status during the term of the parties' collective bargaining agreement.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is unreported. The decision and order of the Board (Pet. App. 9a-22a) are reported at 261 N.L.R.B. 847. The underlying decisions of the Regional Director and the Board in the representation proceeding (Pet. App. 25a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 39a) was entered on September 26, 1983. A petition for rehearing was denied on April 25, 1984 (Pet.

App. 8a). The petition for a writ of certiorari was filed on July 24, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In September 1962, petitioner and the Union [1] signed a memorandum agreement in which petitioner recognized the Union as the collective bargaining representative of its employees who perform work within the recognized jurisdiction of the Union (Pet. App. 14a, 28a).[2] In addition, petitioner agreed to be bound by an industry-wide collective bargaining agreement and all extensions and renewals of that agreement. Petitioner and the Union executed subsequent memorandum agreements in 1966, 1971, and 1977 (*id.* at 28a).

Sometime after it signed the 1962 memorandum agreement, petitioner began to apply the terms of the

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[1] United Brotherhood of Carpenters and Joiners of America, Arizona State District Council of Carpenters and its Constituent Locals: 906, 1061, 1089, 1100, 1153, 1216, 1327, 2763, 857 and Millwright Locals 1914 and 1182.

[2] From 1964 to at least 1969, petitioner employed a small and stable complement of employees in job classifications within the Union's jurisdiction—garage door installers, apprentice installers, and servicemen (Pet. App. 23a, 32a-33a; Tr. 701, 910, 913-915, 1115-1116, 1118-1119). During most of this period, petitioner continually employed either three or four regular employees in these bargaining unit classifications (Pet. App. 32a-33a; Tr. 657-660, 680, 681, 900, 901, 320). The number of employees in these classifications rose to six in 1969, when petitioner started work on a large project (Pet. App. 33a; Tr. 657-660, 680, 681, 900, 901). Most, if not all, of these employees were union members in good standing (Pet. App. 33a; Tr. 673-683, 907-908).

"Tr." refers to the transcript of the hearing in the representation proceeding.

applicable collective bargaining agreements only to bargaining unit employees who advised management that they were union members (Pet. App. 29a, 12a). Petitioner, however, did not inform the Union that it was applying the collective bargaining agreement in this limited fashion (Pet. App. 29a-31a; Tr. 479, 108, 707-708, 126).

In the summer of 1979, union representatives discovered that petitioner employed many individuals who had not been referred out of the hiring hall, as required by the collective bargaining agreement (Tr. 957-966). Petitioner maintained that it had not entered into a contract with the Union by virtue of its execution of successive memorandum agreements and that it was not bound to the current collective bargaining agreement.[3] Petitioner also informed the Union that it was not utilizing the hiring hall to secure employees and that it was applying the terms of the collective bargaining agreement only to union members (Tr. 968-970, 481, 489, 490, 621).

On October 4, 1979, the union wrote to petitioner notifying it that its practices violated the parties' collective agreement and stating that the Union would enforce the agreement by all legal means (Tr. 304; Co. Exh. 6).[4]

2. Contending that the Union's October 4 letter was a demand for recognition, petitioner filed a petition with the Board requesting a representation election in a unit consisting of its installers, servicemen,

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[3] The agreement negotiated in 1979, which ran from June 1, 1979 to May 31, 1982, was in effect when the dispute in this case arose (Pet. App. 9a).

[4] "Co. Exh." refers to petitioner's exhibits in the representation proceeding.

and warehousemen[5] (Pet. App. 26a; Tr. 10). The Union opposed the petition on the ground, inter alia, that the 1979-1982 contract, to which it alleged petitioner was bound, barred the holding of a representation election (Pet. App. 26a). Petitioner argued that the contract was a prehire agreement and that Section 8(f) of the National Labor Relations Act (the Act), 29 U.S.C. 158(f), precludes such agreements from serving as a bar to a representation election.[6]

After an administrative hearing in December 1979, the Board's Regional Director determined that a valid collective bargaining agreement existed between petitioner and the Union.[7] The Regional Director found that since petitioner had executed the successive memorandum agreements with the Union it was bound by the industry-wide 1979-1982 collective bargaining agreement (Pet. App. 28a). In addition, the Regional Director rejected petitioner's contention that the collective agreement was a " 'members only' " contract, applicable only to union members. Rather, the Regional Director found (*id.* at 31a) that "the Union has, at all times, attempted to have [petitioner] apply all the terms of the agreement to employees working in installer, servicem[e]n, and apprentice classifications * * * [and petitioner] has uni-

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[5] Petitioner later amended its petition to include salesmen (Pet. App. 26a).

[6] The Board's contract bar rules ordinarily preclude a challenge to an incumbent union's majority status during the first three years of a collective bargaining agreement. *Hexton Furniture Co.*, 111 N.L.R.B. 342, 344 (1955).

[7] The Regional Director found that the appropriate unit was limited to petitioner's installers, servicemen and apprentices and did not include the warehousemen or salesmen (Pet. App. 33a n.4).

laterally attempted to differentiate between union and nonunion employees without the Union's knowledge or acquiescence." The Regional Director also rejected petitioner's contention that the 1979-1982 agreement was a Section 8(f) prehire agreement that could not be used to bar an election (Pet. App. 32a). The Director found that, although there was no showing that the Union had majority status when the first agreement was executed in 1962, it had subsequently obtained majority status during the years 1964 to 1969 (*id.* at 33a). Accordingly, the Union thereafter was entitled to a presumption of continuing majority status that could not be rebutted during the term of the contract (*ibid.*).

The Board upheld the Regional Director's conclusion, agreeing that "the 1979-82 agreement is not a voidable section 8(f) agreement because the union achieved majority status among [petitioner's] own employees in a permanent and stable unit of installers, servicemen, and apprentices * * *" (Pet. App. 23a-24a).

3. Thereafter, the Union filed unfair labor practice charges against petitioner based on petitioner's refusal to adhere to the terms of the agreement and to recognize the Union. A complaint issued and the Board granted summary judgment against petitioner.[8] It found that petitioner had violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5)

[8] In so ruling, the Board found that all issues raised by petitioner in the unfair labor practice proceeding were or could have been litigated in the prior representation proceeding, that petitioner did not offer to adduce at a hearing any newly discovered or previously unavailable evidence, and that it did not allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.

and (1), by unilaterally changing existing terms and conditions of employment, withdrawing recognition of the Union, and refusing to apply the terms and conditions of the collective bargaining agreement to nonmembers of the Union (Pet. App. 15a, 18a).

The Board ordered petitioner, inter alia, to recognize and bargain with the Union upon request, to honor and abide by the collective bargaining agreement, which ran from June 1, 1979, to May 31, 1982; and to make its employees whole by making fringe benefit contributions and paying wage rates that it had failed to pay since April 27, 1979, as required by the collective bargaining agreement (Pet. App. 16a, 18a-20a).

4. The court of appeals enforced the Board's order in an unpublished memorandum decision (Pet. App. 1a-7a). The court stated (*id.* at 4a) that "[t]he Board properly concluded that the original section 8(f) prehire agreement was transformed into a Section 9(a) contract during the 1964-69 period." The Court further concluded that the Board's reliance on evidence relating to the Union's majority support in the 1964-1969 period was not time-barred by the six month limitation period contained in Section 10(b) of the Act, 29 U.S.C. 160(b) (Pet. App. 5a-6a).

ARGUMENT

The court of appeals' judgment is correct. It does not conflict with any decision of this court or of any other court of appeals. Accordingly, no further review by this Court is warranted.

1. Section 8(f) of the Act, 29 U.S.C. 158(f), permits a union and an employer in the construction industry to enter into a collective bargaining agreement even though the union does not then represent a

majority of the employer's employees. In *NLRB* v. *Local Union No. 103, Iron Workers* (*Higdon Contracting Co.*), 434 U.S 335, 345 (1978), the Court stated that a Section 8(f) agreement constitutes " 'a preliminary step that contemplates further action for the development of a full bargaining relationship,' " and approved the Board's position that a union is not presumed to enjoy majority status simply because it is a party to a Section 8(f) agreement. However, once a union recognized pursuant to a Section 8(f) contract attains a majority in the unit, the union satisfies the criteria for the " 'development of a full bargaining relationship' " and achieves the status of a Section 9(a), 29 U.S.C. 159(a), representative. Its contracts thereafter are entitled to the protection and stability afforded a bargaining relationship established pursuant to Section 9(a). *Higdon*, 434 U.S. at 350.

Here, the Board, upheld by the court of appeals, found that the Union had obtained majority status and that its relationship with petitioner therefore had developed into a full bargaining relationship. Petitioner's challenge to this factual finding raises no issue warranting review by this Court.

2. The first question addressed in the petition (Pet. 10-14)—whether the Board improperly relied on time-barred evidence in making its majority-status finding—is not properly presented on this record. Petitioner contended in the court of appeals that Section 10(b) of the Act, 29 U.S.C. 160(b), precludes reliance on evidence that the Union had obtained majority status during the period 1964 to 1969.[9] Al-

[9] Before the Regional Director and the Board in the representation proceeding, petitioner contested the substantiality of the evidence relied upon by the Board to support the majority status finding. See Br. to Regional Director 31, 34-35; Br. to

though addressed by the court of appeals, the issue was not raised before the Board. Accordingly, under Section 10(e) of the Act, 29 U.S.C. 160(e), the courts lack jurisdiction to consider petitioner's contention. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982).

In any event, there is no merit to petitioner's argument. Petitioner relies on *Local Lodge No. 1424* v. *NLRB*, 362 U.S. 411 (1960), to argue (Pet. 10-12) that Section 10(b) of the Act precludes consideration of evidence about the Union's attainment of majority status in 1964-1969 because that evidence involved events that occurred more than six months before the Union filed the unfair labor practice charge in this case.[10] Despite petitioner's contention, *Local Lodge No. 1424* is not inconsistent with the decision below. Indeed, this Court noted in *Local Lodge No. 1424*, 362 U.S. at 416, that "[i]t is doubtless true that § 10(b) does not prevent all use of evidence relating to [an-

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Board 24-26. In its motion for reconsideration, petitioner further challenged the substantiality of the evidence to support that finding and sought to introduce further evidence pertaining thereto (Mot. for Reconsideration 1-3). In its response to the General Counsel's motion for summary judgment in the unfair labor practice proceeding, petitioner urged that the issue of majority status should be relitigated in the unfair labor practice proceeding (Response to Mot. 4-6). It did not contend that the evidence relied upon in the representation proceeding was inadmissible, nor did petitioner object to the Board's unfair labor practice findings in a petition for rehearing. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982).

[10] Section 10(b), 29 U.S.C. 160(b), provides in pertinent part that:

> * * * no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board * * *.

terior] events." Thus, "where occurrences within the six-month limitations period in and of themselves may constitute, as a substantive matter, unfair labor practices" earlier events "may be utilized to shed light on the true character of matters occurring within the limitations period." *Ibid.*[11]

The facts of this case fit comfortably within this description of permissible evidentiary use of prior events. The Union's rise to majority status obviously did not constitute an unfair labor practice and could not have been the basis for any charge with the

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[11] In *Local Lodge No. 1424* the Court held that the Board could not find unlawful the *enforcement* of a contract during the six-months limitation period where illegality was predicated on the fact that when the contract was *executed*—outside the six-month period—the union did not have majority status. 362 U.S. at 415-417. Here, on the other hand, where Section 8(f) permits the execution of nonmajority contracts in the construction industry, the illegality was not the execution outside the six-month period, but the unilateral refusal to comply with the contract *during* the six-month period. The evidence outside the six-month period merely "shed light on the true character of matters occurring within the limitations period"—whether the parties' relationship had matured into a full bargaining relationship. See *R. J. Smith Constr. Co.*, 191 N.L.R.B. 693, 694-695 (1971), enforcement denied on other grounds *sub nom. Local No. 150, International Union of Operating Engineers* v. *NLRB*, 480 F.2d 1186 (D.C. Cir. 1973). Similarly, in *NLRB* v. *Houston Maritime Ass'n*, 426 F.2d 584, 588-589 (5th Cir. 1970), and *NLRB* v. *Preston H. Haskell Co.*, 616 F.2d 136 (5th Cir. 1980), the court found no illegality during the six-month period and held that *Local Lodge No. 1424* precluded reliance on a "continuing illegality" theory based on a showing of illegal practices in the earlier time-barred period. In *NLRB* v. *MacMillan Ring-Free Oil Co.*, 394 F.2d 26, 31 (9th Cir. 1968), the court also found that the employer's *conduct* during the sixth-month period was not unlawful and that the only evidence of unlawful bargaining was time-barred.

Board. Accordingly, such evidence did not "reviv[e] a legally defunct unfair labor practice" (362 U.S. at 417), but rather served to illuminate the character of subsequent events.

3. Petitioner is incorrect in asserting (Pet. 15) that the effect of the decision below is to "forever bar Yeager from contesting the Union's claim of majority status in the absence of an election." While it is true that the Board's contract bar rules preclude petitioner from challenging the Union's majority status during the term of the contract, it is equally true that once that term expired (in 1982), petitioner was free to challenge the Union's majority. It could do so by establishing a good faith doubt that the Union represented a majority of the employees.[12]

Thus, petitioner's reliance (Pet. 17) on *Precision Striping, Inc.* v. *NLRB*, 642 F.2d 1144 (9th Cir. 1981), and *Pioneer Inn Associates* v. *NLRB*, 578 F.2d 835 (9th Cir. 1978), is misplaced. In *Precision Striping*, the Court acknowledged that (642 F.2d at 1147):

> When the Union obtains majority support, the parties' pre-hire agreement becomes a collective-bargaining agreement executed by the employer with the Union representing a majority of the employees in the unit. * * * The pre-hire agree-

[12] It is settled that an incumbent union, whether or not certified by the Board, enjoys a presumption of majority status. *E.g., Brooks* v. *NLRB*, 348 U.S. 96, 104 (1954); *Terrell* v. *NLRB*, 427 F.2d 1088, 1090 (4th Cir.), cert. denied, 398 U.S. 929 (1970). This presumption can be rebutted by evidence showing that the union has lost the support of a majority of the employees in the particular unit or by evidence that the employer had a reasonable good faith doubt of continued majority status at the time it withdrew recognition. *E.g., NLRB* v. *Crimptex, Inc.*, 517 F.2d 501, 503 (1st Cir. 1975); *NLRB* v. *Gulfmont Hotel Co.*, 362 F.2d 588, 589 (5th Cir. 1966).

> ment is thus transformed into a section 9(a) contract. Upon transformation the contract bar rule applies. That rule prohibits challenges to an incumbent union's majority status during the term of an agreement of three years or less.

But it concluded that majority union membership obtained pursuant to a union security clause does not create an irrebutable presumption of majority union support. *Id.* at 1147-1148. Here, as the court of appeals noted (Pet. App. 5a), there was no union security clause in the contract entered into by the parties[13] and the Board's finding of majority support was based on voluntary membership among a majority of the union employees at the relevant time.[14] In *Pioneer Inn*, 578 F.2d at 838-839, the court upheld application of the Board's contract bar rules against a contention that a temporary period of union inactivity as bargaining agent vitiated this application.

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[13] As the Regional Director pointed out (Pet. App. 29a), Arizona state law prohibits union security agreements.

[14] Petitioner's complaint (Pet. 17) that "[i]t defies logic to presume that 3 to 6 Union employees during 1964 to 1969 conclusively establishes that Union majority status existed among Yeager's employees in 1979" misses the point of the contract bar rule. That rule, which precludes inquiry into majority status during the contractual term irrespective of lack of actual majority, is designed to promote stability of contractual relationships.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

WILFORD W. JOHANSEN
Acting General Counsel

JOHN E. HIGGINS, JR.
Deputy General Counsel

ROBERT E. ALLEN
Associate General Counsel

NORTON J. COME
Deputy Associate General Counsel

LINDA SHER
Assistant General Counsel
National Labor Relations Board

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